

The Trade versus Culture Discourse: Tracing its Evolution in Global Law

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The intensified flows of goods, services, peoples and ideas across borders intrinsic to globalization have had numerous and multi-faceted effects. Those affecting culture have been perhaps the most controversial, as it is more often than not difficult to identify the spill-overs across economic and non-economic areas and across borders, as it is equally hard to qualify the effects of these spill-overs as positive or negative. The debate also tends to be politically and even emotionally charged, which has so far not proven advantageous to establishing a genuine dialogue, nor to finding solutions. This contention and the divergent interests of major players in the international community have been reflected in the institutions and rules of global law. It is the objective of this chapter to explore this institutional architecture, in particular its main (and opposing) constituent fora of the World Trade Organization (WTO) and the United Nations Educational Social and Cultural Organization (UNESCO). The chapter traces the evolution of these institutions and their interaction over time, as well as the underlying objectives, demands and strategies of the key proponents in the trade versus culture discourse, which ultimately shaped the existent law and policy. The chapter concludes with an appraisal of the present state of affairs situating the discussion into the contemporary global governance landscape.

1. The Origins of the Trade versus Culture Discourse

The early years of the discourse on trade and culture evolved under the dictum of cultural exceptionalism, and were marked by attempts to carve out cultural from other, mostly economic policies, in particular at the international scene. Although the idea of state protection of cultural identity has existed for many years, possibly going as far back as the origins of sovereignty,¹ the real policy debates on the relationship between trade and culture began only after World War I. The reason was two-prong and had to do with the changing nature of the medium, on the one hand, and the particularities of that historical period, on the other. In the former sense, although printed media, such as books, newspapers and magazines, were the first manifestation of the industrialized cultural production, they had relatively low tradability, due to their cultural specificity and the use of local language.² Audiovisual media, especially film, in contrast, proved more suitable for engaging and appealing to broader, also foreign, audience.

Timing also mattered. After World War I, the European cinema industry was suffering and clearly losing the battle against Hollywood, which has emerged as the new centre of global visual entertainment.³ As a reaction to this shift of power and

¹ D.S. Petito, 'Sovereignty and globalization: Fallacies, truth, and perception', *New York Law School Journal of Human Rights* 17, 2001, 1139–72.

² M.E. Footer and C.B. Graber, 'Trade liberalisation and cultural policy', *Journal of International Economic Law* 3, 2000, pp. 116–7.

³ J. Trumbour, *Selling Hollywood to the World: US and European Struggles for Mastery of the Global Film Industry, 1920–1950*, Cambridge: Cambridge University Press, 2007; C.M. Bruner, 'Culture, sovereignty, and Hollywood: UNESCO and the future of trade in cultural products', *International Law and Politics* 40, 2008, 351–436; J.P. Singh, *Negotiation and the Global Information Economy*, Cambridge: Cambridge University Press, 2008.

fearing both the economic and cultural impact of Hollywood, many European governments introduced measures to protect their domestic film industries, mostly in the form of import and screen quotas. These measures were reflected in the General Agreement on Tariffs and Trade (GATT) 1947. Article IV thereof permitted quotas for ‘the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time’, while preserving GATT’s general ban on quantitative restrictions on imports (Article XI). The screen quotas are a proof of the sought-after (and accepted by the GATT Members) cultural exception, as well as of its narrow focus on audiovisual media.

The idea that some measures protecting national cultural industries may be justified was also taken up in bilateral and regional fora. In 1988, the Canadian negotiators celebrated a major victory, as they succeeded in introducing a ‘cultural exclusion’ clause in the Canada–US Free Trade Agreement (CUSFTA).⁴ Five years later, such exclusion became part of the North American Free Trade Agreement (NAFTA) too.⁵ It should be noted, however, that this cultural clause was coupled with a retaliation provision that significantly limited by design its practical use.

To be sure, the stakes were much higher in the multilateral context, and the trade versus culture battle truly escalated during the Uruguay Round of trade negotiations (1986–1994). The reasons for this heightened tension are various but certainly the most important has to do with the round’s special mandate. One should be reminded that the Uruguay Round was not plainly aimed at dismantling tariff barriers, as it has been the convention with other GATT talks but was a much further reaching undertaking that ultimately led to the establishment of the WTO with a new structure and an unprecedentedly effective dispute settlement mechanism.⁶ The WTO, which became operational on 1 January 1995, included also domains previously unaffected by international trade regulation – most notably, intellectual property (by means of the Agreement on Trade-related Aspects of Intellectual Property Rights, TRIPS) and services (by means of the General Agreement on Trade in Services, GATS).

The slogan of the time was ‘exception culturelle’ and its supporters strived to exempt any product or service that is culture-related from the rules of the negotiated WTO Agreements. Still, and this should be kept in mind, the main focus of the efforts was on the exclusion of audiovisual services.⁷ Reflecting this, during the Uruguay trade talks, a Working Group on Audiovisual Services was established with the task to consider whether the special cultural considerations related to the audiovisual sector demanded its total exclusion from the scope of the services agreement, or whether a dedicated annex to the Agreement would provide a solution.⁸ The opinions differed profoundly, and even the diplomatic vernacular of trade representatives could not conceal the chasm between those in favour of free trade and those in favour of

⁴ Canada–US Free Trade Agreement, 22 December 1987–2 January 1988, 27 ILM 281 (1988).

⁵ North American Free Trade Agreement, 17 December 1992, 32 ILM 289 (1993).

⁶ J.H. Jackson, *The World Trading System: Law and Policy of the International Economic Relations*, Cambridge, MA: MIT Press, 1997.

⁷ Pursuant to the technical classification scheme, which WTO Members applied during the negotiations, these included: motion picture and video tape production and distribution services; motion picture projection services; radio and television services; radio and television transmission services; sound recording and others: WTO, Services Sectoral Classification List Doc.MTN.GNS/W/120, 1991.

⁸ WTO, Working Group on Audiovisual Services, Communication from the European Communities, Draft Sectoral Annex on Audiovisual Services, MTN.GNS/AUD/W/2, 1990.

shielding (national) culture. While Canada and audiovisual media exporters, such as India, Brazil and Hong Kong were important actors,⁹ it is noteworthy that the greatest clash on media matters was between the EC and the United States.¹⁰ The conflict shaped and continues to define the discourse on trade and culture that maps onto key architectural choices in global law.

While generally the EC sought to secure sufficient wiggle room for cultural policy measures, at that point of time, it was also particularly keen to preserve the quotas recently introduced through the Television without Frontiers Directive,¹¹ and to make them permissible at the international level.¹² Rhetorically, the Community pursued its goals by relying on a set of arguments relating to the specific qualities of cultural goods and services. As such, it argued, they demanded specific policies, which can correct the market failures in the relevant markets and ensure welfare.¹³ The cultural identity line of defence has also been prominent in the EU tactics – on the one hand, by emphasizing the importance of the audiovisual industry to European identity and unity, and by highlighting the harmful effects of the American entertainment industry, on the other.¹⁴ Overall, this strategy has been politically strengthened by the enduring negative attitude towards globalization and its effects upon culture shared by key domestic constituencies.¹⁵

The US, effectively lobbied by the entertainment industry,¹⁶ matched the European offensive. The US was opposed to any cultural exception, regardless of its form. Its strongest argument was that of disguised protectionism, especially considering the intrinsic difficulty of defining ‘national’ and ‘culture’. It also stressed consumers’

⁹ WTO, Working Group on Audiovisual Services, Communication from the European Communities, Draft Sectoral Annex on Audiovisual Services, MTN.GNS/AUD/W/2, 1990a.

¹⁰ Singh, *op. cit.*, pp. 122–3 and *passim*. It is fair to say that the EC was not united in this approach and there were various opinions within the Community – with France being very pro-active and Germany and Britain somewhat reluctant. The Commission, headed at the time by Jacques Delors, acted as a strong policy entrepreneur in shaping the views of the Member States (G. Ross, *Jacques Delors and European Integration*, Oxford: Polity, 1995, p. 115; D.A. Levy, *Europe’s Digital Revolution: Broadcasting Regulation, the EU and the Nation State*, London: Routledge, 1999; Singh, *op. cit.*, p. 127).

¹¹ The TVWF contained two provisions specifically targeting culture. Article 4 TVWF calls upon Member States to ensure that broadcasters allocate a majority of time on TV channels, to Europe-made programmes (the so-called ‘European works’). Article 5 TVWF is intended to secure that a minimum proportion of viewing time (10%) is reserved to European works created by independent producers, or alternatively that a minimum programme budget is allocated to independent productions.

¹² M. Burri, ‘Trade *versus* culture in the digital environment: An old conflict in need of a new definition’, *Journal of International Economic Law* 12, 2009, 17–62.

¹³ Failures typical of markets for cultural goods and services are: (i) failures due to economies of scale in production and distribution; (ii) failures due to the nature of competition in products with public goods aspects; (iii) failures due to the impact of externalities on the pricing of cultural products; and (iv) failures due to collective action problems. See P. Sauvé and K. Steinfatt, ‘Towards multilateral rules on trade and culture: protective regulation or efficient protection?’, in Productivity Commission & Australian National University (eds), *Achieving Better Regulation of Services*, Canberra, AU: AusInfo, 2000, pp. 323–46.

¹⁴ Singh, *op. cit.*, pp. 132–3.

¹⁵ D. Held, A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, Stanford, CA: Stanford University Press, 1999; T. Cowen, *Creative Destruction: How Globalization Is Changing the World’s Cultures*, Princeton, NJ: Princeton University Press, 2002; A. Giddens, *Runaway World: How Globalisation is Reshaping Our Lives*, London: Routledge, 2002.

¹⁶ P.S. Grant and C. Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World*, Vancouver, CA: Douglas and McIntyre, 2004, pp. 352–76; Singh, *op. cit.*, pp. 134–8.

freedom of choice, as well as other positive effects of free trade in cultural products.¹⁷ Being cautious about pushing too far on the cultural identity issue, the US had been consistent in framing the whole debate as one on trade *not* culture.¹⁸

2. The Law of the WTO and the Agreement to Disagree

The cultural exception agenda only partially attained its goals. In the dawn of Marrakesh, without striking any concrete deal, the EU and the US basically agreed to disagree on addressing cultural matters,¹⁹ and this is reflected in the design and substance of WTO law, in particular in the rules on trade in services.

While no services sector is excluded from the scope of the GATS,²⁰ there are a number of flexibilities built in, which allow the less opening of certain sectors sensitive to domestic constituencies.²¹ While under the GATT, which regulates trade in goods, obligations regarding national treatment and quantitative restrictions apply across the board, the GATS framework adopted a ‘positive list’ approach. Thereby, WTO Members can choose the services sectors and sub-sectors in which they are willing to make market access (Article XVI GATS) and/or national treatment (Article XVII GATS) commitments, and can define their modalities. Even the MFN obligation – that is, the duty to treat equally all like foreign services and services suppliers, which is fundamental to the entire trade system, can be subject to limitation under the GATS (Article II:2).

As a result of this malleability in design, almost all Members, with the exception of the US, Japan and New Zealand, have been reluctant to commit and have listed significant MFN exemptions.²² Indeed, audiovisual media is the least liberalized services sector.²³ What is interesting when looking at the Members’ commitments for audiovisual services, and most illustratively those of the EU, is that they reflect a resolute ‘all-or-nothing’ approach. The scheduling flexibility permitting a wide variety of commitments ranging between full liberalization and absolute non-commitment is not made use of. This is odd because for some sub-sectors government regulation and trade restrictions are not common (e.g. for sound recording). In a more

¹⁷ WTO (1990a), op. cit.

¹⁸ Singh, op. cit., pp. 134–5.

¹⁹ As legend would have it, early in the morning of 14 December 1994, just before the US President’s Fast Track Authority was to expire, Leon Brittan, as EU representative, offered the US Trade Representative (USTR) Mickey Kantor a deal to bind the television quota at 49% as part of an audiovisual services agreement and to continue negotiations on box office receipt taxes in France, as well as on blank video and audio tapes taxes. After discussions with President Clinton and Hollywood representatives, the US turned the deal down instead of signing something to which the lobbies at home would have opposed. E.H. Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International System*, Chicago, IL: University of Chicago Press, 1995, p. 172; Singh, op. cit., pp. 135–6.

²⁰ Except for services supplied in the exercise of governmental authority, Article I:3(b).

²¹ F.S. Galt, ‘The life, death, and rebirth of the “cultural exception” in the multilateral trading system: An evolutionary analysis of cultural protection and intervention in the face of American pop culture’s hegemony’, *Washington University Global Studies Law Review* 3, 2004, 909–35.

²² M. Roy, ‘Audiovisual services in the Doha Round: Dialogue de sourds, the sequel?’, *Journal of World Investment and Trade* 6, 2005, 923–52; WTO, 2010.

²³ WTO, European Communities and their Member States, Final List of Article II (MFN) Exemptions, GATS/EL/31, 1994; WTO, European Communities and their Member States, Schedule of Specific Commitments, Trade in Services, Supplement 3, GATS/SC/31/Suppl. 3, 1997.

systemic sense, this compromises the very purpose of an international trade agreement to provide predictability and stability.²⁴

Despite this state of affairs, which permits almost unlimited possibilities for measures protecting domestic cultural industries and/or discriminating against foreign products and services, the Uruguay Round's 'Agreement to Disagree' was not a real solution for cultural proponents. As the trade forum could not provide adequate design to safeguard cultural concerns, a change of venue seemed to many appropriate. It was at that time, when the concept of 'cultural diversity' was introduced into the trade and culture discourse and embraced by the former cultural exception advocates.²⁵ This reconceptualization seemed to cast aside some of 'the negativism and the latent "anti-Americanism" of the 'cultural exception' rhetoric'.²⁶ Cultural diversity had a positive but also a more proactive connotation, which was symptomatic of the more intensified developments in the following decade.

3. UNESCO and the Search for a New Institutional Home

UNESCO is the special organization of the United Nations for amongst others cultural matters. Yet, it was only in the 1990s that it took a concrete interest in protecting cultural diversity from the (alleged) negative effects of economic globalization. The repositioning started off with the *World Decade for Cultural Development* (1988–1997) and UNESCO's role substantially expanded thereafter with the objective to acknowledge the cultural dimension of development, affirm and enrich cultural identities, broaden participation in culture and promote international cultural co-operation.²⁷ The idea of a legally binding instrument on cultural diversity was also only a second-thought in UNESCO. The process originally started under two unrelated to the UN agency fora – the International Network of Cultural Policy (INCP) and the International Network for Cultural Diversity (INCD),²⁸ and it was only in 2003 that these efforts on international instrument on cultural diversity moved to UNESCO.²⁹ Relatively swiftly thereafter, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was adopted by the 33rd UNESCO General Conference. The US was also active in this process but as can be expected acted as a fervent adversary. It is indeed often argued that the US rejoined UNESCO in 2003 specifically because of the distressing prospect of a legally binding

²⁴ Roy, op. cit., pp. 940–1.

²⁵ European Commission, The EU Approach to the WTO Millennium Round, COM, 331 final, 8 July 1999.

²⁶ C.B. Graber, 'The new UNESCO convention on cultural diversity: A counterbalance to the WTO', *Journal of International Economic Law* 9, 2006, 553–74, p. 555.

²⁷ UNESCO, *UNESCO and the Issue of Cultural Diversity: Review and Strategy, 1946–2004*, Paris: UNESCO, revised version, 2004, p. 16. See also Resolution adopted by the General Assembly of the United Nations, World Commission on Culture and Development, A/Res./46/158, 19 December 1991; UNESCO, World Commission on Culture and Development, *Our Creative Diversity*, 2nd ed., Paris: UNESCO, 1996; UNESCO, *World Culture Report 1998: Culture, Creativity and Markets*, Paris: UNESCO, 1998; UNESCO, *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism*, Paris: UNESCO, 2000.

²⁸ The INCP was a forum of cultural ministers, driven by a small group of countries, comprising Canada, Croatia, France, Greece, Mexico, Senegal, South Africa, Sweden and Switzerland. The INCD was a non-governmental organization (NGO), set up at the initiative of the Canadian Heritage in 1998 and intended to complement the efforts of the INCP by bringing together national cultural NGOs, artists and other activists. K. Acheson and C. Maule, 'Convention on cultural diversity', *Journal of Cultural Economics* 28, 2004, 243–56, p. 246.

²⁹ UNESCO 32 C/Resolution 34, Desirability of Drawing up an International Standard-Setting Instrument on Cultural Diversity, 17 October 2003.

instrument on cultural diversity “to be negotiated in a forum in which the United States had no formal input”.³⁰

4. An Appraisal of the UNESCO Convention on Cultural Diversity

The UNESCO Convention has been celebrated as an exceptional success in international treaty-making – as it was the first legally binding instrument on cultural matters, with a record of incredibly wide support and swift ratification. In the trade versus culture discourse, the Convention was intended to take up a critical role and counterbalance the highly institutionalized economic rules of the WTO³¹ and ensure the attainment of non-economic, in particular cultural objectives at the global level. It is however questionable whether the UNESCO Convention provides sufficient instrumentarium to achieve any of these goals.

The critique of the Convention is well documented³² and its drawbacks can be grouped into three categories, relating to (i) the lack of binding obligations; (ii) its substantive incompleteness; and (iii) its ambiguous relation towards other international instruments. We discuss them briefly before considering the Convention’s practical impact.

(i) Although the UNESCO Convention was meant to be a binding instrument, in fact it has precious few obligations, and these are formulated as best effort duties for the Parties. There are only two provisions that can be said to be of a binding nature. The first resembles the WTO’s enabling clause³³ and relates to the preferential treatment that developed countries must grant to cultural workers and cultural goods of developing countries.³⁴ The second, formulated in Article 17, creates an obligation for international co-operation in situations of serious threat to cultural expressions, construed in particular as assistance from developed to developing countries. Even this pair of obligations is vague and unlikely to bring about radical change. The duties are also somewhat marginal to the proclaimed goal of cultural diversity.

Despite the limited obligations on the Parties to take action to protect and promote cultural diversity, the Convention formulates an extensive block of rights to that end. Article 6(2) provides a non-exhaustive list of measures that the Parties may adopt. The list is virtually all encompassing.³⁵ This approach, adding up to the Convention’s

³⁰ Bruner, op. cit., p. 383. While the US had been one of the parties involved in UNESCO’s founding in 1945, in 1984 it left due to the starkly diverging views of the US and of developing countries and as a reaction to the 1980 MacBride report, which was viewed by the US as an assault on principles of free speech.

³¹ Graber, op. cit.

³² See M. Hahn, “‘A clash of cultures?’” The UNESCO Diversity Convention and international trade law’, *Journal of International Economic Law* 9, 2006, 515–52; Graber, op. cit.; R. Craufurd Smith, ‘The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a new world information and communication order?’, *International Journal of Communication* 1, 2007, 24–55; Burri (2009), op. cit.

³³ GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (‘Enabling Clause’).

³⁴ Article 16 UNESCO Convention.

³⁵ See Article 6(2)(a)–(h) UNESCO Convention. For taxonomy of cultural policy measures, see Footer and Graber, op. cit., pp. 122–6.

broad and fuzzy definition of ‘cultural diversity’,³⁶ and the lack of proportionality or efficiency tests, opens the door to state activism in a wide range of economic sectors that affect culture in one way or another. The value added by the Convention’s Operational Guidelines in assisting efforts to concretize targeted action and ensure balanced choices can be deemed minimal so far.³⁷

(ii) Despite its seemingly broad scope, the framework of the UNESCO Convention is in fact not comprehensive enough to secure the protection and promotion of cultural diversity. Some of the missing critical pieces are related to the centrality of state sovereignty, which is intrinsic to the UNESCO Convention as all rights and obligations stemming from the Convention are attributed to states.³⁸ This may be understandable for an intergovernmental treaty but cultural rights do not correspond to national boundaries.³⁹ The fact that the UNESCO Convention subscribes to respecting and safeguarding human rights⁴⁰ may partly remedy this situation but it is still disappointing that specific cultural rights – such as access to education or use of language of choice – did not make it into the text.⁴¹ Neither are the specific rights of indigenous peoples,⁴² nor those of media organizations, journalists or individuals appropriately safeguarded.

A vital element omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble,⁴³ is intellectual property rights (IPRs). This omission is odd, since IPRs have as their core objective the protection and promotion of creativity and innovation, and are thus an indispensable element of all processes related to the creation, distribution of and access to cultural content.⁴⁴

(iii) A significant drawback of the Convention in terms of the critical role it was supposed to play as a counter-force to economic globalization (as epitomized by the WTO) is its ‘conflict of laws’ provision. This crucial norm fails to ensure any meaningful interface with the rules of the WTO (or any of the other existing international agreements) in case of a conflict between them.⁴⁵ Article 20 provides

³⁶ Article 4(1) defines ‘cultural diversity’ as referring ‘to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.’

³⁷ All guidelines are available at <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/operational-guidelines/> (last accessed 24 January 2013).

³⁸ Article 2(2) UNESCO Convention.

³⁹ A. Eide, ‘Cultural rights as individual human rights’, in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights*, The Hague: Kluwer Law International, 2001, 2nd ed., pp. 289–301; E. Stamatopoulou, *Cultural Rights in International Law*, Leiden: Brill, 2007.

⁴⁰ Articles 2(1), 2(3) and 7 UNESCO Convention.

⁴¹ Craufurd Smith, *op. cit.*, pp. 28, 37.

⁴² Despite few mentions: Recitals 8, 13 and 15 of the preamble, Articles 2(3) and 7(1)(a) UNESCO Convention.

⁴³ Recital 17 of the UNESCO Convention’s preamble.

⁴⁴ See e.g. J.E. Cohen, ‘Creativity and culture in copyright theory’, *UC Davis Law Review* 40, 2005, 1151–1205; M. Burri, ‘Cultural protectionism 2.0: Updating cultural policy tools for the digital age’, in S. Pager and A. Candeub (eds), *Transnational Culture in the Internet Age*, Cheltenham, UK: Edward Elgar, 2012, pp. 182–202.

⁴⁵ For all possible causes of conflict, see A. Dahrendorf, ‘Free trade meets cultural diversity: The legal relationship between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions’, in H. Schneider and P. van den Bossche (eds), *Protection of Cultural Diversity from an International and European Perspective*, Antwerp: Intersentia, 2008, pp. 31–84.

simultaneously that, '[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties,'⁴⁶ and that, 'without subordinating this Convention to any other treaty,' Parties shall foster mutual supportiveness between the Convention and the other treaties to which they are parties.⁴⁷ Evidently, this rather paradoxical formulation excludes modification of rights and obligations of the Parties under other existing treaties.⁴⁸

To sum up the critique of the UNESCO Convention's text, one can maintain that it is an instrument of soft rather than hard law,⁴⁹ which largely evades controversies and while affirming state sovereignty in cultural policy matters, fails to provide adequate guidance on how to design appropriate, future-oriented instruments capable of protecting and promoting cultural diversity in a world of profound rule fragmentation and complexity and of rapid technological change.⁵⁰

5. The Impact of the UNESCO Convention

Yet, the virtue of the Convention needs to be explored beyond its textual basis.⁵¹ On the one hand, with regard to the WTO as the defined 'adversary' and natural institutional counterpart in the trade versus culture context. On the other hand, one needs to consider the Convention's impact outside the forum of the WTO in the broader and multi-level landscape of governance.

i. The Convention's impact vis-à-vis the WTO

Despite the great number of states that have ratified the UNESCO Convention, its impact on the WTO regime is likely to be minimal. This is due to the weakness of the Convention but also due to the closed and less responsive system of the WTO. The impressive track-record of the UNESCO Convention cannot mask the much more complicated political economy behind it, as different states have ratified it for very different reasons.⁵² Although the Canadian and French delegations,⁵³ assisted by a number of NGOs, were fairly efficient during the Convention's negotiation,⁵⁴ this mobilization is not strong enough to go beyond the weak regulatory charge of the Convention and matter when 'real' trade interests are at stake. At present, it is unlikely that a negotiating bloc will form within the WTO to push for more culture-

⁴⁶ Article 20(2) UNESCO Convention.

⁴⁷ Ibid.

⁴⁸ Graber, *op. cit.*, pp. 565–8; Hahn, *op. cit.*, pp. 540–6; P.T. Stoll, 'Article 20. Relationship to other treaties: Mutual supportiveness, complementarity and non-subordination', in S. von Schorlemer and P.T. Stoll, *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes*, Heidelberg: Springer, 2012, pp. 519–43; G.C. Shaffer and M.A. Pollack, 'Hard vs. Soft Law: Alternatives, complements, and antagonists in international governance', *Minnesota Law Review* 94, 2010, 706–99, p. 772.

⁴⁹ Shaffer and Pollack, *op. cit.*, p. 771.

⁵⁰ Smith, 'The UNESCO Convention', pp. 53–54; M. Burri, 'Trade and culture in international law: Paths to (re)conciliation', *Journal of World Trade* 44, 2010, 49–80; Burri (2012), *op. cit.*

⁵¹ K.J. Alter and S. Meunier, 'The politics of international regime complexity', *Perspectives on Politics* 7, 2009, 13–24, p. 16.

⁵² For instance, Brazil, Japan and India have all ratified the Convention but remain equally willing to engage in further liberalization of the audiovisual sector. See Pauwels *et al.*, *op. cit.*

⁵³ Supported by Germany, Greece, Mexico, Monaco, Morocco and Senegal, and a number of Francophone UNESCO Member States.

⁵⁴ Acheson and Maule, *op. cit.*

oriented solutions – such as including some sort of ‘cultural exception,’⁵⁵ an express clause for culture in the general exception provisions of the GATT (Article XX) and the GATS (Article XIV), or listing cultural diversity as one of the objectives of the WTO in the Preamble of the WTO Agreement.⁵⁶ This is evident from the current state of trade talks, as launched under the Doha Development Agenda in 2001.⁵⁷

Although Doha has not stalled because of the trade versus culture debate, the requests and offers tabled so far reveal precious few new commitments and no future-oriented rules-design that could address cultural matters at their intersection with economic interests. The legacy line of separation between the EU and the US with their respective pro-culture and pro-trade positions, if we are to describe them in a typified manner,⁵⁸ clearly persists. This is particularly palpable in the audiovisual services sector, which has been the most contentious in this clash and is likely to remain the service sector with the fewest commitments even after a successful completion of the Doha round.⁵⁹ Despite the widely shared recognition by key WTO Members that the audiovisual sector has changed dramatically,⁶⁰ in particular due to the sweeping transformations caused by the Internet, there is little agreement on the way forward.

One could argue that the trade versus culture status quo has indeed been perpetuated through the UNESCO Convention. This has had multiple effects for the WTO outside the narrow domain of audiovisual services. The spill-over effects are felt in the discussions on advancing liberalization and coherent multilateral regulation in the ‘neighbouring’ areas of telecommunications and electronic commerce.⁶¹ Overall, the WTO, is in many senses, rendered unable to appropriately address trade in the Internet age,⁶² despite the organization’s inherent flexibility and potential to adapt.⁶³ This may be deemed a negative rather than a positive development.⁶⁴

Against the backdrop of this political deadlock, many observers have hoped that when a new ‘trade versus culture’ case emerges, the WTO adjudication – as a uniquely powerful mechanism of dispute resolution at the international level – would provide a final resolution to the conflict, possibly also clarifying the status of the UNESCO

⁵⁵ Burri (2009), op. cit.

⁵⁶ There are plenty of proposals that fall into this category. For an overview as well as references to the authors, see Burri (2009), *ibid.*, pp. 46–53.

⁵⁷ WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 2010.

⁵⁸ See e.g. Bruner, op. cit.

⁵⁹ See WTO, Communication from the European Communities and its Member States, Conditional Revised Offer, TN/S/O/EEC/Rev.1, 2005; WTO Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/310, 2010.

⁶⁰ C.B. Graber, ‘Audio-visual policy: The stumbling block of trade liberalisation’, in D. Geradin and D. Luff (eds), *The WTO and Global Convergence in Telecommunications and Audiovisual Services*, Cambridge: Cambridge University Press, 2004, 165–214, pp. 166–70; Roy, op. cit., pp. 931–36.

⁶¹ S. Wunsch-Vincent, ‘Trade rules for the digital age’, in M. Panizzon, N. Pohl and P. Sauvé (eds), *GATS and the Regulation of International Trade in Services*, Cambridge: Cambridge University Press, 2008, 497–529, pp. 501–5; R.H. Weber and M. Burri, *Classification of Services in the Digital Economy*, Zurich: Staempfli & Berlin: Springer, 2012.

⁶² M. Burri and T. Cottier (eds), *Trade Governance in the Digital Age*, Cambridge: Cambridge University Press, 2012.

⁶³ See e.g. R. Cooney and A. Lang, ‘Taking uncertainty seriously: Adaptive governance and international trade’, *European Journal of International Law* 18, 2007, 523–51.

⁶⁴ Burri (2009), op. cit.

Convention and its relationship with the WTO rules.⁶⁵ The *China–Publications and Audiovisual Products* case,⁶⁶ decided to the benefit of the United States in 2009, proved the contrary. China’s attempt to apply the UNESCO Convention as a shield for some measures in the media domain remained futile and the Convention’s impact on the WTO rules was dismissed.⁶⁷

Interestingly, the Panel did leave a door open for further consideration of cultural concerns, as it interpreted broadly the public morals exception under Article XX(a) GATT.⁶⁸ It acknowledged China’s claim that ‘... reading materials and finished audiovisual products are so-called “cultural goods” and these are ‘of a unique kind with a potentially serious negative impact on public morals.’⁶⁹ Despite the fact that the Panel found the measures at issue not ‘necessary within the meaning of Article XX(a),’⁷⁰ this may be interpreted as newly enhanced flexibility of the WTO rules with regard to culture, which can be used in the future (albeit the *chapeau* test of Articles XX GATT and XIV GATS still remains hard to pass).

ii. The Convention’s impact outside the WTO

As noted earlier, the standstill in the WTO in trade and culture matters, which has only been confirmed by the UNESCO Convention, has had repercussions outside the WTO. The example with digital trade and the inability of the WTO to tackle the relevant questions because of the issue-overlaps with culture is illuminating. It is symptomatic of the overall intensified power-plays, which lead to increased fragmentation of both negotiation themes and of negotiation fora. The lack of solutions within the WTO context has driven and will continue to drive Members to take the bilateral or regional paths to advance their policy priorities. The United States in particular has made substantial efforts to ensure implementation of its Digital Agenda⁷¹ through a number of preferential trade agreements (PTAs). The agreements reached since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries,⁷² and most recently with Panama, Colombia and South Korea, contain only minimal restrictions on digital products, applying a negative scheduling approach (in contrast to the standard GATS positive pick-and-choose mode) and also tackle some ‘deep’ e-commerce regulatory issues.⁷³ The

⁶⁵ Graber, *op. cit.*, pp. 567, 571; Voon, *op. cit.*, p. 652.

⁶⁶ WTO Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 21 December 2009, confirming in most essential points WTO Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/R, adopted 12 August 2009.

⁶⁷ WTO Appellate Body Report, *China–Publications and Audiovisual Products*, para. 4.207, referring to Article 20 UNESCO Convention.

⁶⁸ Following the meaning of the term in Article XIV(a) GATS as broadly interpreted in *US–Gambling*. See WTO Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US–Gambling)*, WT/S285/R, adopted 10 November 2004, paras 6.461 and 6.465.

⁶⁹ WTO Panel Report, *China–Publications and Audiovisual Products*, para. 7.751.

⁷⁰ *Ibid.* para. 7.913.

⁷¹ See S. Wunsch-Vincent, ‘The digital trade agenda of the US: Parallel tracks of bilateral, regional and multilateral liberalization’, *Aussenwirtschaft* 1, 2003, 7–46.

⁷² The DR-CAFTA includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

⁷³ See Wunsch-Vincent (2003), *op. cit.*, pp. 28–35; Wunsch-Vincent (2008), *op. cit.*, pp. 516–23.

mega-regional of the Trans-Pacific Partnership (TPP) Agreement may be going even further.

It should be noted that the United States has shown some deference to the culturally inspired measures of its PTA partners in the field of audiovisual services. It permitted some policy space for those measures, as long as they are ‘frozen’ at their present level,⁷⁴ and often to the exclusion of newer digital media. It is also noteworthy that the leeway given to the US partners with respect to trade in cultural products tends to reflect the negotiating capacity of the states involved – the smaller the country, the more concessions it makes.⁷⁵ Policy room thus may often be substantially reduced and countries (especially the poorer) may not be able to appropriately address diverse public interests in the field of media – particularly digital media – in effect constraining the possibilities for implementing the UNESCO Convention in the said domains and distorting any present or future trade/culture balance.

The impact of the Convention on its own parent organization, the UNESCO, and its authority can be deemed sizeable, as it has subsequently become a hub of new activities. The UNESCO Convention has also effectively contributed to promoting the notion of cultural diversity and establishing it as a global public good, as a distinct regulatory objective worth pursuing in a wide range of activities and venues, both domestically and internationally. This mobilization should not be underestimated and may have multiple spill-over effects. The first test of these effects has been the reporting exercise that some of the Convention’s ratifying parties underwent in 2012 – 4 years after the UNESCO Convention’s entry into force.

The evidence provided in the countries’ reports can be analysed with mixed conclusions. The overall impact of the activities so far seems somewhat small in practical terms, especially when domestic implementation is concerned. It is hard to draw the line between those instruments and interventions, which have been specifically designed to address the UNESCO Convention’s objectives and the ‘business as usual’ in national cultural policies. As positive achievements one could list the development of best practices, the building of statistical resources and the impact assessments of the tools applied, which may in the longer run improve the efficiency of the measures and dispel some of the protectionist fears the UNESCO Convention has instilled.⁷⁶ In international affairs, the EU Protocols on Cultural Cooperation are an innovative tool,⁷⁷ whose application and further development is to be closely followed. Generally speaking, it may take time before some of the longer-term effects of the Convention, as alluded earlier, are felt, as institutional building is often involved and patterns and practices need to settle.

⁷⁴ T. Voon, ‘A new approach to audiovisual products in the WTO: Rebalancing GATT and GATS’, *UCLA Entertainment Law Review* 14, 2007, 1–32, pp. 25–6.

⁷⁵ I. Bernier, ‘The recent free trade agreements of the United States as illustration of their new strategy regarding the audiovisual sector’, April 2004, available at http://www.coalitionsuisse.ch/doss_sc/unesco_ccd/bernier_us_ftas_and_av_sector1.pdf (last accessed 22 January 2013), p. 15.

⁷⁶ Mira Burri, ‘The UNESCO Convention on Cultural Diversity: An appraisal five years after its entry into force’, *NCCR Working Paper* 1, 2013, forthcoming in *International Journal of Cultural Property* 20, 2013.

⁷⁷ See the chapter by Psychogiopoulou in this volume.

More broadly, one should assess the Convention's impact against the backdrop of the contemporary global governance,⁷⁸ to which the UNESCO Convention was a reaction and in which it is now embedded. Trade and culture can be, in many senses, the poster child of fragmented global governance with many, parallel and partially overlapping international regimes that are not hierarchically ordered. It is precisely due to this intrinsic to the system complexity and to the various multi-directional and multi-effect interactions in it that the clarity of the Convention's legal obligations was reduced and overlapping sets of rules were introduced, which address, amongst others, issues of trade, culture, intellectual property, development and human rights.

We find the theoretical framework of international regime complexity, which examines these existing multiple, overlapping and non-hierarchical regimes and their interaction⁷⁹ particularly fitting to capture the many facets of the UNESCO Convention's effects and the evolution of the trade versus culture discourse. This framework would suggest that fragmentation is an evolving quality of regimes, contingent on actors' preferences and bargains. So, it conjectures that 'where state preferences are similar, lawyers overcome fragmentation by crafting agreements that resolve conflicts across regimes, and thus legal ambiguity is transitory. Where preferences diverge, states block attempts to clarify the rules and thus ambiguity persists, allowing countries to select their preferred rule or interpretation.'⁸⁰

As discussed above, and perhaps for the worse of the system, the EU and the US have starkly diverging positions on the matters of trade and culture. The EU-US distributive conflict is also highly likely to continue, so that the UNESCO and the WTO regimes are exceedingly unlikely to 'converge into a new synthesis, but rather will remain in conflict for a prolonged period.'⁸¹ The deadlock in the WTO realm with regard to cultural products and services may have led to overall greater uncertainty and unpredictability regarding the WTO trade liberalization commitments and the ways forward, both in terms of future commitments and rules design. The UNESCO and related fora focusing on cultural policies will remain soft in character and impact, largely contributing to further fragmentation in institutional and rule architecture.

6. Concluding Remarks: On the Present and Future of the Trade versus Culture Discourse

The chapter mapped the evolution of the trade versus culture discourse in particular by looking at the international institutions embodying both sides of the conflict – the

⁷⁸ See e.g. M. Kahler and D.A. Lake (eds), *Governance in a Global Economy: Political Authority in Transition*, Princeton: Princeton University Press, 2003; J.L. Dunoff and J.P. Trachman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009; T. Cottier and P. Delimatsis, *The Prospects of International Trade Regulation: From Fragmentation to Coherence*, Cambridge: Cambridge University Press, 2011.

⁷⁹ Alter and Meunier talk of 'international regime complexity' to signify the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered and stress that the lack of hierarchy is particularly typical of the international level. See Alter and Meunier, *op. cit.*, p. 13. This follows up on important work on the notion of 'regime complex.' See K. Raustiala and D.G. Victor, 'The regime complex for plant genetic resources', *International Organizations* 58, 2004, 277–309; See also L.R. Helfer, 'Regime shifting in the intellectual property system', *Perspective on Politics* 7, 2009, 39–44; L.R. Helfer, 'Regime shifting: The TRIPs agreement and new dynamics of international intellectual property lawmaking', *The Yale Journal of International Law* 29, 2004, 1–83.

⁸⁰ Alter and Meunier, *op. cit.*, p. 16.

⁸¹ Shaffer and Pollack, *op. cit.*, p. 773.

WTO and UNESCO and their interaction. We could not help but notice the incredible path dependence in the positions of the major stakeholders, the EU and the US, and how this mattered in shaping institutional choices. In many senses very little has changed since the conclusion of the Uruguay talks in 1994, when the cultural exception battle reached its peak. Although the UNESCO Convention on Cultural Diversity may be, and has been interpreted especially right after its adoption, as a breakthrough and a solid attempt to counterbalance trade and culture, economic and non-economic interests, we showed that both its text and actual impact disappoint in important aspects. As it appears that within the closed venues of UNESCO and the WTO no radical, if any, change can be expected, it is interesting to trace the effects of this deadlock on other venues, as actors seek to accommodate their interests and preferences elsewhere. At the regional level, especially as PTAs increase in number and depth of regulatory convergence,⁸² they take up also many of the issues left unresolved as trade and culture clash, such as in the field of digital trade. There is still however no future-oriented solution for the actual reconciliation of trade and cultural concerns offered. And there may never be as the theoretical conjectures of international regime complexity suggest and as a concrete recent reminder of this path-dependent discourse reveals. The latter concerns a decision of the EU Parliament on the occasion of the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) Agreement between the EU and the US. While the European Parliament did give green light to the TTIP, it expressly asked, under the substantial influence of France, that cultural and audiovisual services, including online services, to be excluded from the negotiating mandate in order to safeguard the ‘cultural exception’ and protect the cultural and linguistic diversity of the EU countries.⁸³ So, it seems that we are pretty much back to square one, at least in terms of the political debate.

The perpetuation of the trade versus culture quandary may be unfortunate. On the one hand, it does not reflect the reality that culture and trade are ‘inextricably related’.⁸⁴ On the other hand, we argued that it triggers or at least does not obstruct the proliferation of fragmented institutions and rules, increasing overall complexity and rendering the governance of key global public goods more difficult.⁸⁵ As a factor that exacerbates this state, one could add rapid technological development, in particular in the field of digital media. We have argued elsewhere⁸⁶ that this may have led, amongst other things, to an acute mismatch between the ‘old’ cultural exception policies and the practical reality of contemporary cultural creation, distribution and consumption.⁸⁷ Persistent path dependence in both trade and cultural law and policies has hindered innovative solutions so far.

⁸² WTO, *The WTO and Preferential Trade Agreements: From Co-existence to Coherence*, Geneva: WTO, 2011.

⁸³ European Parliament, *Resolution on EU Trade and Investment Negotiations with the United States of America* (2013/2558(RSP)), paras 11–2.

⁸⁴ R.J. Neuwirth, ‘The future of the “culture and trade debate”: A legal outlook’, *Journal of World Trade* 47, 2013, 391–420, p. 395.

⁸⁵ E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (eds), *Reflexive Governance for Global Public Goods*, Cambridge, MA: MIT Press, 2012.

⁸⁶ Burri (2012), op. cit.

⁸⁷ Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven, CT: Yale University Press, 2006.

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